Nos. 93-1612 and 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of this Court, this brief is respectfully submitted by The New York Clearing House Association (the "Clearing House") with the consent of all parties.

INTEREST OF *AMICUS CURIAE*

The Clearing House is an unincorporated association of eleven leading commercial banks in the City of New York.[1] Four of the Clearing House member banks are national banking associations subject to the National Bank Act (the "NBA")[2] and, thus, to the supervision and regulation of petitioners the Comptroller of the Currency and the Office of the Comptroller of the Currency (together, the "OCC"). The Clearing House frequently appears as an *amicus curiae* in cases, such as this, raising important questions of banking law.

The Clearing House has a substantial interest in the questions presented by the petitions for a writ of certiorari (the "Petitions") filed herein because of its member banks' interest and involvement in the sale of annuities. In addition, in reliance on the regulations and authorizations of the OCC and other banking regulators, Clearing House member banks sell other products related to their conduct of the business of banking that, unlike annuities, are generally considered insurance. Those products include credit life, credit disability, mortgage life, mortgage disability, and involuntary unemployment insurance.

As a result of the decision below, national banks that are now engaged in, or that are considering engaging in, the sale

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

[2] Ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of Title 12 of the United States Code).

of annuities and credit-related insurance products may face legal challenges to their power to do so. In addition, the Fifth Circuit's unduly narrow construction of the "incidental powers" clause contained in Section 24 (Seventh) of the NBA has engendered confusion regarding the scope of recognized powers of national banks. The OCC has authorized national banks to engage in numerous activities, not specifically enumerated in the NBA, that are incidental to the business of banking, and commercial banks have expended substantial resources in reliance on those authorizations and are presently providing such services to millions of their customers.

Both law and business necessity compel Clearing House member banks to rely on the interpretations of the federal banking laws of the OCC and other banking agencies. Member banks frequently invest substantial time and money introducing new products and services in reliance on such interpretations. The Fifth Circuit's invalidation of the entirely rational OCC determination that national banks may sell annuities as agents disrupts the regulatory predictability and stability that are indispensable to the business of banking and the ability of banks to serve their customers.

SUMMARY OF ARGUMENT

1. As recognized by the four judges who dissented from the Fifth Circuit's denial of rehearing *en banc*, "[n]o one can seriously question the importance of this case to the banking industry and to commerce and competition in general." (NationsBank of North Carolina ("NBNC") Pet. App. at 21). This Court should grant certiorari because the erroneous decision of a single panel of the Fifth Circuit, if left to stand, may force national banks to exit the market, now totalling almost $100 billion annually, for the sale of annuities. Banks possess almost twenty percent of this profitable and still rapidly growing market. The decision of a panel of the Fifth Circuit—which was not reheard *en banc*, although a majority of that court's active judges who did not

recuse themselves voted in favor of rehearing—also calls into question the power of banks to sell other financial and insurance products that have become an increasingly important source of revenue for commercial banks and an increasingly significant component of the services that banks provide to their customers.

2. The Fifth Circuit directly contravened this Court's decision in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), in refusing to defer to the OCC's determination that annuities are not "insurance" for purposes of the supplementary insurance powers provisions of 12 U.S.C. § 92, and in engaging in a *de novo* analysis of that issue. There was no basis in either the text or the legislative history of Section 92 for the Fifth Circuit to override the OCC's reasonable interpretation of the statute that the OCC is charged with administering. Moreover, the Fifth Circuit ignored overwhelming authority holding that annuities are not insurance, but rather a form of financial investment instrument of the sort that national banks have long sold pursuant to their express power to engage in all aspects of the "business of banking."

The analysis and result below also ran afoul of the *Chevron* deference rules in rejecting the OCC's construction of the "incidental powers" clause of Section 24 (Seventh) of the NBA to authorize national banks to broker annuities as part of their historical role as agents for the sale of securities and other financial investment instruments. The OCC reasonably concluded in the exercise of its informed judgment and on the basis of its knowledge and experience in the regulation of commercial banking that the sale of annuities is an element of the "business of banking" within the meaning of Section 24 (Seventh). The Fifth Circuit not only impermissibly substituted its own views on the matter for the OCC's interpretation, but departed in approach and result from other case law, including the New York Court of

Appeals' recent interpretation of the provision on which the "incidental powers" clause of Section 24 (Seventh) was based and its application to the sale of annuities by New York-chartered banks. *See New York State Ass'n of Life Underwriters, Inc.* v. *New York State Banking Dep't*, 1994 N.Y. LEXIS 324 (N.Y. Ct. App. Mar. 30, 1994) ("*NYSALU*").

3. The decision below has deepened the important conflict among the courts of appeals over whether Section 92 impliedly bars national banks located in communities of more than 5,000 from acting as agents for the sale of certain specialized insurance products related to the conduct of the business of banking. The Second and Fifth Circuits, in reliance on case law that pre-dates this Court's decision in *Chevron*, have held that Section 92 bars such activities, while the D.C. Circuit has concluded that it does not. The ability of national banks to engage in significant activities, especially activities that increase competition, should not be governed by the fortuity of the location of a bank or the venue in which the bank's actions may be challenged.

4. The Fifth Circuit's clear departure from the established principle of judicial deference to the OCC's reasonable interpretation of NBA provisions threatens regulatory predictability and stability in the banking industry. If national banks could not rely on OCC regulations under, and interpretations of, the NBA, they would be deprived of the predictability necessary to the development of innovative commercial banking practices.

REASONS FOR GRANTING THE PETITIONS

I.

THE PETITIONS PRESENT QUESTIONS OF EXCEPTIONAL IMPORTANCE TO NATIONAL BANKS AND THE NATION'S ECONOMY.

The sale of annuities in the United States is now estimated to total approximately $100 billion annually. *See* Karen Talley, *N.Y. Banks Gearing Up Annuities After Ruling*, The American Banker, Apr. 7, 1994, at 12. Annuities compete directly with other popular investment products, such as certificates of deposit, mutual funds and stocks and bonds; and they "have become the retirement vehicle of choice for many Americans." Kalen Holliday, *Annuities Head List Of Insurance Products At Banks, Study Finds*, The American Banker, Sept. 30, 1993, at 20. They are particularly important because they permit investors to defer the taxation of their investment gains. *See* 26 U.S.C. § 72.

Although annuities were sold primarily by insurance companies in the past, commercial banks have substantially increased their sale of annuities in recent years in response to their customers' demands for more sophisticated, flexible and higher-yielding products than conventional bank accounts. More than seventy of the nation's 100 largest banks now offer annuities to their customers. *See* Karen Talley, *Bank Annuity Sales Seen Surging in '93*, The American Banker, June 30, 1993, at 17. In 1993, commercial banks' annuity sales reportedly reached an estimated $16 billion annually, *see id.*, and such sales represented about seven percent of all bank brokerage activity. *See* Kurt Cerulli & David Nadig, *Variable Annuities Add a Steady Flow to Bank Brokerages' Revenue Streams*, The American Banker, July 14, 1993, at 12. Securities firms and other financial service providers are also major sellers of annuities.

As part of their historical function as financial intermediaries, commercial banks have long possessed broad powers to buy and sell financial instruments as agents for their customers. *See Securities Indus. Ass'n* v. *Federal Reserve Bd.*, 468 U.S. 207, 215 (1984). In response to substantially increased competition from other financial intermediaries, such as savings banks, securities brokerage firms and mutual funds, commercial banks have expanded their brokerage of securities, annuities and other financial investment instruments where natural synergies with their core banking businesses exist. *See* U.S. Department of the Treasury, *Modernizing the Financial System: Recommendations for Safer, More Competitive Banks*, Fed. Banking L. Rep. (CCH), No. 1377 at XVIII-9-XVIII-23 (Feb. 14, 1991). Such brokerage activities have generated substantial revenue for banks without posing a risk to their safety or soundness and have benefited consumers by increasing the availability, and reducing the cost, of financial investment instruments, such as annuities. *See* David Shapiro & Thomas F. Streiff, *Annuities* 17 (1992).

The decision below has created uncertainty regarding whether national banks may continue to sell annuities and may open the door to legal challenges to the ability of banks to sell other products, such as credit life, credit disability, mortgage life, mortgage disability, and involuntary unemployment insurance, that are incidental to the business of banking. More generally, the decision calls into question the extent to which national banks may continue to respond to the needs of their customers in the rapidly changing marketplace for financial products. These considerations clearly warrant exercise of this Court's plenary jurisdiction; they are all the more compelling given that the decision below represents the view of only a minority of the judges of the issuing circuit who considered the matter and was sharply criticized by the judges who supported the suggestions for rehearing *en banc*.

(*See* NBNC Pet. App. 20a (panel "badly erred"); *see also* OCC Pet. at 21-22; NBNC Pet. 9-10).

In addition, the importance of the questions presented here has been augmented by the recent decision of the New York Court of Appeals confirming that the "incidental powers" clause of the New York Banking Law—which served as the model for the predecessor of Section 24(Seventh)—empowers New York-chartered banks to sell financial investment instruments such as annuities and to adapt their product lines to meet changing economic conditions and the evolving demands of commercial banking customers. *See NYSALU*, 1994 N.Y. LEXIS 324 (N.Y. Ct. App. Mar. 30, 1994). Unless this Court reverses the Fifth Circuit's decision, national banks, including certain Clearing House member banks, would be placed at a distinct disadvantage vis-a-vis New York-chartered banks (and banks chartered elsewhere that follow the New York approach) devaluing their federal charters.

II.

THE FIFTH CIRCUIT DEPARTED FROM *CHEVRON* IN OVERRIDING THE OCC'S REASONABLE CONSTRUCTION OF TWO IMPORTANT PROVISIONS OF THE NBA.

This Court has long recognized the necessity of judicial deference "to [an agency's] construction of a statutory scheme it is entrusted to administer." *Chevron* v. *Natural Resources Defense Council*, 467 U.S. at 844 (footnotes omitted); *see also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-06 (applying *Chevron* to OCC's interpretation of federal banking laws). The Fifth Circuit violated this principle of deference in overruling the OCC's reasonable interpretation of Sections 92 and 24 (Seventh) of the NBA.

1. As the Petitions demonstrate, the Fifth Circuit's decision that annuities are "insurance" for purposes of

Section 92, and its method of arriving at that conclusion, conflict sharply with *Chevron*. (*See* OCC Pet. at 11-14; NBNC Pet. at 14-22). The Fifth Circuit plainly erred in "substitut[ing] its own construction of a statutory provision for [the OCC's] reasonable interpretation." *Chevron*, 467 U.S. at 844. There is nothing in Section 92 or its legislative history indicating Congress' intent—much less "clear" intent, as is required by *Chevron*—that annuities be considered "insurance" within the meaning of that statute. Because Congress has never addressed that "precise question," it was plainly within the province of the OCC to interpret the statute, and mandatory for the Fifth Circuit to defer to that interpretation. *Id.* at 843.

Indeed, the respective determinations that annuities are not a form of insurance by the New York Court of Appeals in *NYSALU* and of the Fifth Circuit judges who dissented from the denial of the suggestions for rehearing *en banc* demonstrate powerfully that the OCC had far more than a reasonable basis for construing Sections 24 (Seventh) and 92 to permit national banks to broker annuities and that there was no justification for the panel below to have substituted its view for the OCC's. As the Petitions establish, "the great weight of authority" conflicts with the Panel's conclusion and, instead, "supports the position that annuities are not insurance." *NYSALU*, 1994 N.Y. LEXIS 325 at 14, *quoted in* OCC Petition at 13; *see also* NBNC Petition at 15-16.

The Fifth Circuit, in impermissibly substituting its judgment for the OCC's, focused solely on annuities for which the benefits are paid over the duration of the annuitant's life (a life income option). (*See* NBNC Pet. App. at 12a, 27a). Most annuities are structured, however, such that benefits are paid for a specified period of time (*e.g.*, 5, 10 or 15 years) (a term certain option) or in a lump-sum distribution of the entire cash value of the annuity. *See* David Shapiro & Thomas R. Streiff, *Annuities*, *supra*, at 2-4 (describing different types of annuities).

Contrary to the conclusion of the Fifth Circuit (NBNC Pet. App. at 11a), the fact that "[a]ll fifty states currently regulate annuities under their insurance laws" does not strip annuities of the characteristics of a financial investment instrument and render them forms of insurance. "'Banking' and 'insurance' are not mutually exclusive businesses; 'from a functional point of view there is a considerable overlap between the [two].'" *American Ins. Ass'n* v. *Clarke*, 656 F. Supp. 404, 409-10 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1988) (quoting Henry Harfield, *Bank Credit and Acceptances* 184 (5th ed. 1974)) (brackets in original).

2. The Fifth Circuit also departed from *Chevron* in rejecting the OCC's reasonable interpretation of Section 24 (Seventh) to include the power to sell annuities within that section's authorization to national banks to "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking."

It was plainly within the province of the OCC to construe the technical terminology of the "incidental powers" clause to permit national banks to broker annuities. *Cf. NYSALU*, 1994 N.Y. LEXIS 324 at *7 ("[c]learly, the 'incidental powers' clause in Banking Law Section 96(1) does not consist of common words of clear import, and that clause is susceptible to differing interpretation"). At a minimum, it was not clearly unreasonable for the OCC to interpret the "business of banking" as used in Section 24 (Seventh), as being "comprised of all those powers which are recognized incidents or features of that business." OCC Interpretive Letter No. 494, *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,083, at 71,195 (Dec. 20,

1989).[3] Thus, there was no basis for the Fifth Circuit to reject the OCC's determination that the express authorization in Section 24 (Seventh) for commercial banks to engage in "all such incidental powers as shall be necessary to carry on the business of banking" includes the power to sell annuities and other financial investment instruments as agents. (*See* NBNC Pet. App. at 38a).

Even if the Fifth Circuit were authorized to examine *de novo* the OCC's interpretation of the "incidental powers" clause—and it was not—the court erred in holding that "conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed 'necessary.'" (NBNC Pet. App. at 14a-15a). This unduly narrow construction of the incidental powers clause — which defines "necessary" as synonymous with "essential" — is contrary to that of other courts of appeals and of the banking regulators charged with interpreting and enforcing the NBA. *See First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 778 (8th Cir.) (collecting cases holding that "the 'incidental powers' of national banks are not limited to activities that are deemed essential to the exercise of express powers"), *cert. denied*, 498 U.S. 972 (1990). For example, the Ninth Circuit has recognized that the incidental powers clause was included in the NBA "to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *cf. SEC* v. *Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 71 (1959) (refusing "to freeze the concepts of 'insurance' or 'annuity' into the mold they fitted when [the Securities, Investment Company and McCarran-Ferguson] Acts were passed" and, thus, holding

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[3] The OCC relied upon Interpretive Letter 494 in determining that national banks may broker fixed-rate annuities. (*See* NBNC Pet. App. at 38a).

that variable annuities are "securities" that must be registered with the SEC).

The Fifth Circuit's crabbed interpretation of the incidental powers clause of the NBA is in stark contrast to that of the New York Court of Appeals in *NYSALU*. The Court of Appeals deferred to state bank regulators in holding unanimously that commercial banks chartered in New York may sell annuities as agents, construing the incidental powers provision of Section 96(1) of the New York Banking Law, the provision on which Section 24 (Seventh) of the NBA was based,[4] to authorize New York-chartered banks to expand their banking services over time to meet evolving business practices and customer needs. *See NYSALU*, 1994 N.Y. LEXIS 324 at *13. The approach of the New York Court of Appeals — which looks to whether an activity is consistent with the economic functions of, and is of a nature historically or customarily performed by, commercial banks — is far more in keeping with Congress' intent in creating a national banking system.

The Fifth Circuit's departure from this approach and result will likely generate substantial confusion and uncertainty as to the nature and extent of the "business of banking" in the United States. Given the exceptional importance of this issue to the commercial banking industry and its customers, the Court should grant certiorari and hold that the OCC reasonably determined that annuities are financial investment instruments and that the brokerage of those instruments is included among the traditional powers of national banks under Section 24 (Seventh) of the NBA.

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[4] *See Arnold Tours, Inc.* v. *Camp*, 472 F.2d 427, 431 (1st Cir. 1972); Phillip R. Trimble, *The Implied Power of National Banks to Issue Letters of Credit and Accept Bills*, 58 Yale L.J. 713, 719 (1949).

III.

THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER NATIONAL BANKS LOCATED OUTSIDE OF SMALL TOWNS MAY SELL "INSURANCE" PRODUCTS THAT ARE INCIDENTAL TO THEIR BANKING BUSINESS.

Because the Fifth Circuit erroneously concluded that annuities are a form of "insurance" (NBNC Pet. App. at 10a), the court was required to decide whether the sale of annuities is covered by Section 92. In rejecting the OCC's determination that Section 92 does not prohibit national banks from brokering annuities, the Fifth Circuit intensified the existing conflict among the courts of appeals over whether Section 92 bars national banks in communities with populations exceeding 5,000 from acting as sales agents for *all* "insurance" products, even when the OCC determines that such sales *are* incidental to the business of banking.

The court below (NBNC Pet. App. at 10a, 13a-17a) and the Second Circuit in *American Land Title Association* v. *Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993), have held that Section 92 impliedly bars national banks from selling annuities and title insurance, respectively, notwithstanding the OCC's determination that the sale of those products is incidental to the business of banking. Both courts applied the erroneous construction of Section 92 first adopted by the Fifth Circuit in *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968), sixteen years before this court's decision in *Chevron*. By contrast, the D.C. Circuit has rejected this erroneous construction of Section 92 and upheld the OCC's determination that national banks may sell credit life insurance as incidental to the business of banking. *See Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164, 1169-70 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *see also Independent Ins. Agents* v. *Federal Reserve*

Bd., 736 F.2d 468, 477 n.6 (8th Cir. 1984) (upholding Federal Reserve's approval of bank holding company's application to engage in credit-related property and casualty insurance, and noting "strong argument" that *Saxon* had "wrongly decided" that Section 92 bars banks from selling insurance).

Section 92 provides that "*[i]n addition* to the powers now vested by law in national banking associations," national banks in small towns may "act as the agent for any fire, life, or other insurance company" in selling insurance policies. (Emphasis added). As the Petitions demonstrate (*see* OCC Pet. at 14-15; NBNC Pet. at 24-25), the language and legislative history of Section 92 support the OCC's (and the D.C. Circuit's) view that Section 92 is a *supplemental* grant of authority providing additional sources of income for national banks located in small towns from the sale of insurance that is *not* incidental to the business of banking. Section 92 does not restrict the power of national banks to conduct "the business of banking."[5] The court below erred in refusing to enforce the OCC's interpretation.

Instead, the Fifth Circuit relied upon the maxim of construction *expressio unius est exclusio alterius* to conclude that Section 24 (Seventh) does not apply here. (*See* NBNC Pet. App. at 15a-16a). However, Section 92 does not address—and, thus, the maxim cannot be invoked to restrict—the powers Section 24 (Seventh) grants to national banks to

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[5] *See Independent Bankers Ass'n* v. *Heimann*, 613 F.2d at 1170 n.18 ("[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies"); *Independent Ins. Agents* v. *Federal Reserve Bd.*, 736 F.2d 477 n.6 ("[t]he legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance").

engage in insurance-related activities that *are* incidental to the business of banking. (*See* NBNC Pet. at 25-26).

The ability of national banks to engage in a wide range of banking activities should not depend upon the fortuity of a bank's location or the venue in which the bank's activities are challenged. Accordingly, this Court should now resolve the important conflict among the courts of appeals over whether Section 92 bars national banks in communities of more than 5,000 persons from selling insurance-related products that are incidental to the business of banking. Although this conflict has previously existed, it is posed for the first time in the context of a judicial decision that could require scores of banks to discontinue existing services involving billions of dollars in revenues. This is a straightforward question of statutory construction requiring determination by this Court to forestall further conflict and uncertainty affecting an important sector of the nation's financial system.

IV.

THE FIFTH CIRCUIT'S FAILURE TO FOLLOW *CHEVRON* THREATENS THE OCC'S EXPERT ADMINISTRATION OF THE NBA AND THE DEVELOPMENT OF BANKING GENERALLY.

This Court should grant certiorari for the additional reason that the Fifth Circuit's rejection of the OCC's determination that national banks may sell annuities, in clear contravention of *Chevron*, has disrupted the regulatory predictability and stability essential to the banking business. The OCC is the federal agency charged with the regulation of national banks and the administration of the NBA. Law and business necessity compel national banks to rely on the OCC's interpretation of the permissible scope of their banking activities.

More generally, banks are subject to a comprehensive scheme of regulation that pervades every aspect of their operations and procedures. Many parts of this scheme are specifically left to implementing regulations of the banking agencies. Other aspects of this scheme, particularly those enacted many years ago, require interpretation and, frequently, reinterpretation to account for changing financial, economic and technological developments.

Since the enactment of the NBA in 1864, there have been enormous changes in the banking and financial services industries, and a growing homogenization in the products offered to consumers. For example, consumers now have a wider range of choices among the money market instruments offered by banks, brokerage firms and mutual funds. If banks could not rely upon OCC regulations and interpretations in response to the evolving demands of the marketplace, they would be unable to meet the changing demands and needs of their customers, and inevitably their competitive position would deteriorate.

If allowed to stand, the decision below would pave the way for other courts to substitute their construction of the NBA for the reasoned interpretations of the OCC, even where the regulator's interpretation is supported by the statute's language and legislative history. Such an approach inevitably would result in piecemeal and inconsistent application of the federal banking laws and would hinder the development of a coherent body of law for the national banking community.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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